

Consideration of objections with respect to Findings of Fact and Conclusions of Law with Final Order Following Remand from Judicial Review in the matter of *Cress v. Byer*; Administrative Cause No. 12-192W

- **Finding of Fact and Conclusions of Law with Final Order Following Remand from Judicial Review**
- **Steuben Circuit Court Order Following Judicial Review (Cause No. 76C01-1410-MI-335)**
- **Natural Resources Commission's Findings of Fact and Conclusions of Law with Modified Final Order (dated September 4, 2014)**

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

LUCY V. CRESS, ROBERT A. SCHULTZ)	
and BARBARA J. SCHULTZ,)	
Claimants,)	Administrative Cause
)	Number 12-192W
vs.)	
)	
JOHN BYRER and SHERI BYRER,)	
Respondents,)	
)	(Riparian Rights Dispute)
DEPARTMENT OF NATURAL RESOURCES,)	
Agency Respondent.)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH FINAL ORDER FOLLOWING REMAND FROM JUDICIAL REVIEW**

Statement of the Proceeding and Jurisdiction

1. On October 30, 2012, Lucy V. Cress ("Cress") filed a "Temporary Structure Dispute/Complaint" (the "Cress Complaint") with the Natural Resources Commission (the "Commission") in which she asserted a grievance against John Byrer and Sheri Byrer (the "Byrers").
2. Also on October 30, 2012, Robert A. Schultz and Barbara J. Schultz (the "Schultzes") filed correspondence (the "Schultzes Complaint") in which the Schultzes asserted a grievance against the Byrers.
3. Cress owns real estate at 95 Ln. 130A Lake George, Fremont, Indiana (the "Cress Property"); the Schultzes own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Schultzes Property"); and, the Byrers own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Byrers Property"). The Cress Property includes on its west side approximately 66 feet of frontage along Lake George within Lot 23 in the Plat of Wilder's Addition to Spring Bank in Jamestown Township of Steuben County ("Lot 23"). The Schultzes Property is to the north in Lot 24 and shares a common boundary with the Cress Property. The Byers Property includes Lot 38, and it is east of the Cress Property and across Lane 130 A Lake George ("Lot 38"). The Byers Property was granted easement rights to Lake George by a previous owner of the Cress Property.

4. Lake George in Steuben County is a "public freshwater lake" as the phrase is defined at Ind. Code § 14-26-2-3 and 312 Ind. Admin. Code § 11-2-17 and is subject to IC § 14-26 (the "Lakes Preservation Act"). *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and "Listing of Public Freshwater Lakes", Information Bulletin #61 (Second Amendment), Indiana REGISTER, 20110601-IR-312110313NRA (June 1, 2011), p. 8. The Commission adopted rules at 312 IAC § 11 to assist with administration of the Lakes Preservation Act.

5. The Cress Complaint and the Schultzes Complaint describe disputes regarding the exercise of riparian rights by the Byrers for a portion of Lake George in Steuben County, Indiana.

6. The same administrative law judge was appointed to consider the Cress Complaint and to consider the Schultzes Complaint. During the initial prehearing conferences held concurrently on January 25, 2013 to consider the Cress Complaint and the Schultzes Complaint, Cress, the Schultzes, and the Byrers agreed to consolidate the two complaints into this single proceeding. Cress and the Schultzes are collectively the "Claimants". The Byrers are the "Respondents".

7. During the initial prehearing conference, Cress moved to add the Department of Natural Resources (the "DNR") as a party. The DNR responded that particularly if mediation were to occur, the inclusion of DNR as a party might be well-considered. The Byrers did not object to inclusion of the DNR, and the DNR was added as a party. The DNR is the "Agency Respondent". The Claimants, the Respondents, and the Agency Respondent are collectively the "Parties". Each of the Parties was present during the initial prehearing conference either in person or through an attorney.

8. The Lakes Preservation Act places full power over public freshwater lakes in Indiana. The State holds public freshwater lakes in trust for all Indiana citizens to preserve the lakes' natural scenic beauty and for recreational purposes. The DNR is the agency responsible for administering the trust. *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).

9. The Commission is the "ultimate authority" for agency determinations under the Lakes Preservation Act, including those derived from competing interests among persons claiming riparian rights or interests in riparian rights that may be sufficient for the placement of piers and similar structures in public freshwater lakes. IC § 14-10-2-4 and IC § 14-26-2-23. *Kranz v. Meyers Subdivision Property Owners*, 969 N.E.2d 1068, 1075 (Ind. App. 2012) and *Lukis v. Ray*, 888 N.E.2d 325 (Ind. App. 2008).

10. The Lakes Preservation Act is derived from legislation originating in 1947. Statutory amendments made in 2000 included the addition of IC § 14-26-2-23. The amendments clarified the Commission is responsible for adopting rules to help implement a licensure program that includes temporary piers. The Commission is also charged with resolving disputes between "the interests of landowners having property rights abutting public freshwater lakes or rights of access to public freshwater lakes." The Commission is to address "competing riparian interests". IC § 14-26-2-23(e) and IC § 14-26-2-23(f).

11. The Commission has jurisdiction over the subject matter and over the persons of the Parties.

Delineation of the Riparian Zones of the Cress Property and of the Schultzes Property

12. Where the shoreline approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters. *Bath v. Courts*, 459 N.E.2d 72, 73 (Ind. App. 1984) and the “second principle” in Information Bulletin #56 (Second Amendment), Indiana REGISTER, 20100331-IR-31200175NRA (March 31, 2010), p. 3.

[VOLUME 13, PAGE 280]

13. The Parties stipulated the second principle delineates properly the common boundary between the riparian zones of the Cress Property and of the Schultzes Property.^[11] “Entries Regarding Identification of Riparian Zones of Cress and the Schultzes and Availability of Sandra Jensen to Serve as Mediator” (April 4, 2013). The shoreline along the Cress Property and the Schultzes Property approximates a straight line, and their common onshore property boundary is approximately perpendicular to the shoreline. Use of the second principle is an appropriate delineation, and the Parties’ stipulation is approved. The boundary of the riparian zone between the Cress Property and the Schultzes Property is determined by extending their common onshore boundary in a straight line into Lake George.

Adjudication of Riparian Interests

14. The Claimants are riparian owners. The Byers are not riparian owners but have an easement across the Cress Property. The Byers hold the dominant estate and Cress the servient estate. A determination that persons are not riparian owners “does not settle the question of whether they are entitled to install and use a dock in the property enjoyment of their easement for right-of-way purposes.” *Klotz v. Horn*, 558 N.E.2d 1096, 1097 (Ind. 1990), citing *Farnes v. Lane*, 281 Minn. 222, 161 N.W.2d 297, 301 (Minn. 1968). “The issue is not whether the easement holder attains riparian ownership status, but rather, whether he is entitled to *use* the riparian rights of the servient tenant who has given him access to the body of water bordering the servient estate.” Emphasis supplied by the *Klotz* court at 1097.

15. The intentions of the riparian owner who originally granted an easement are to be implemented in construing the easement. In a plat or other recorded conveyance, clear language controls. “Dominant owners of lakeside easements may gain the rights to erect and maintain piers, moor boats and the like by the express language of the creating instrument.” *Klotz* at 1097 and 1098. Related documents are construed *in pari materia*. *Charles & Miller v. Dyer*, 13 Caddnar 246, 250 (2014).^[12]

16. Clear and unambiguous language controls. “[G]enerally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been.” *Klotz* citing *Badger v. Hill*, 404 A.2d 222, 226, (Me. 1979). In *Klotz*, the Indiana Supreme Court determined the phrase “access to Eagle Lake” for a six-foot wide

easement was ambiguous and properly required the consideration of "extrinsic or parol evidence to ascertain the intent of the parties who created the instrument." A factor determined appropriate to identifying intent was whether, in the absence of a pier, shoreline conditions would make difficult the dominant estate's access to and enjoyment of the lake.

17. The record of title in this proceeding is extensive. Aspects of grantor intent are unambiguous and others are ambiguous.

18. In 1929, Alline Buck Bender ("Bender") received warranty deeds to both Lot 23 and Lot 38.

19. In 1942, Bender conveyed a portion of Lot 23 to Phil S. Morse. She included a conveyance of the following easement or passway:

Also, conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or roadway along the east side of said Lot #23....

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants...of Lot #38 of said Plat.

Respondent Exhibit B and Exhibit C.

20. In 1942, Bender conveyed to H. Poast the east end of Lot 23, together with a conveyance, as follows:

The east 65 feet, east and west, off the entire east end of Lot numbered 23..., excepting an easement or passway six feet in width off the north side of the above described premises for the use of owners or tenants of cottage on the west portion of said Lot #23 and the owners or tenants of cottage on Lot #38 of said Plat. Also conveying an easement or passway 6 feet in width off the north side of the west part of said Lot #23 extending from the land above described to the water front of Lake George; also docking privileges for two boats at the northwest part of said Lot #23.

21. Also in 1942, Bender conveyed Lot 38 to Arthur and Bertha Sanders with the following easement or passway:

Lot numbered thirty-eight (38)...according to the recorded plat thereof.

Also, an easement or passway six feet in width extending from the street or road on the west side of said Lot #39 to the water front of Lake George, said easement or passway being off the north side of Lot #23....

Also conveying a dock privilege for two boats off the northwest part of Lot #23 in said Addition for the owner or tenant of the cottage located on said Lot #38.

Using the same description, Lot 38 passed through a chain of title and then to Daniel and Nancy Vail in 1985. Respondent Exhibit Q.

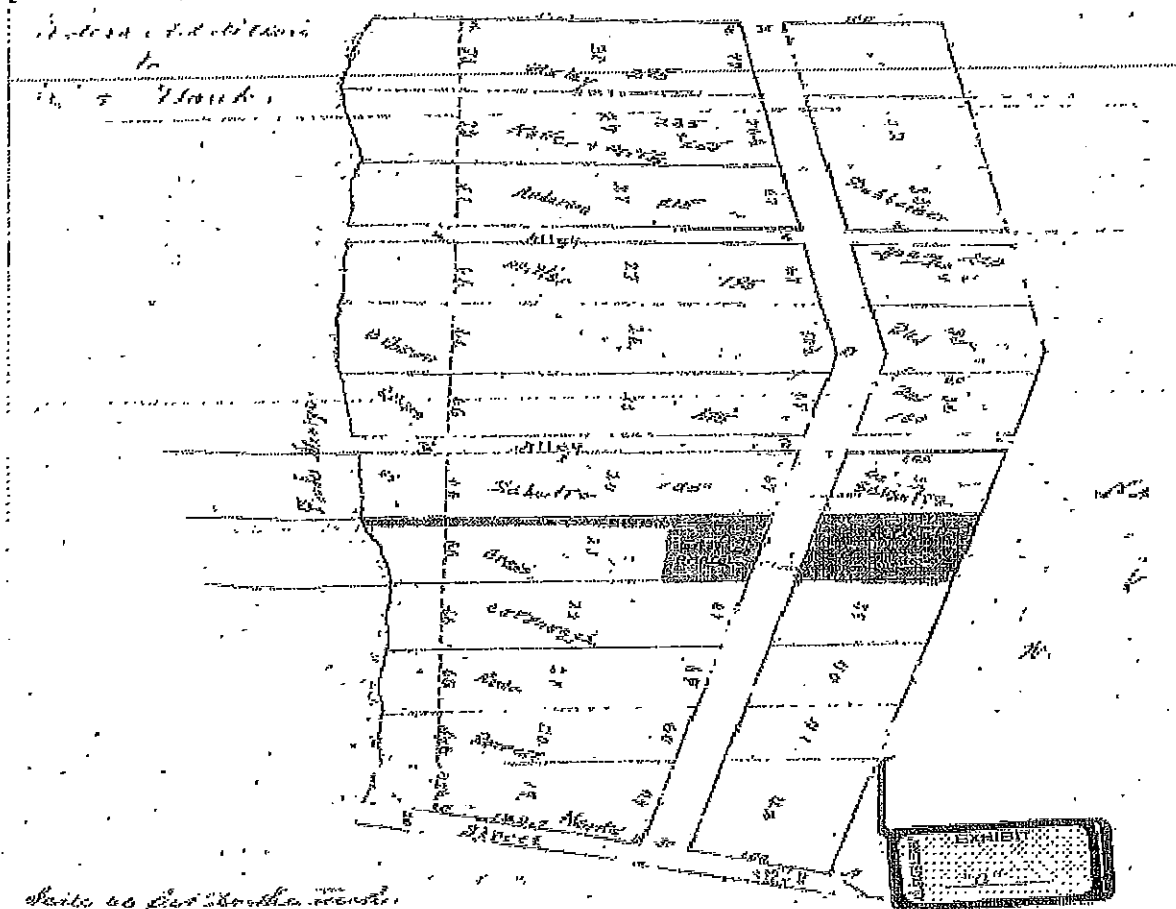
22. In 1992, Nancy Vail, an unmarried widow, conveyed Lot 38 to John H. Byrer and Sarah L. Hull as follows:

Lot numbered Thirty-eight (38) in the Plat...

Also an easement 6.0 feet in width off from the North side of Lot numbered Twenty-three (23)..., together with dock privileges [as described in Finding 21].

23. A conceptual rendering of the site in question, without identification of riparian zones or non-riparian interests within Lake George, is colorized and identified as Exhibit "C" in the "Respondents' Post-Trial Brief":

[VOLUME 13, PAGE 281]



24. The grantor intent was unambiguous in that a six-foot wide easement was established along the northern border of Lot 23, for the benefit of owners of the eastern portion of Lot 23 and the owners of Lot 38, to access Lake George. The grantor intent was also unambiguous in that the owners of the eastern portion of Lot 23 were granted docking privileges for two boats, and the owners of Lot 38 were granted docking privileges for two boats, off the northwest part of Lot 23. In its "Answer, Affirmative Defenses & Counterclaim", the Byrers assert "a deeded right for a pier and two boats...."

25. The grantor intent was ambiguous in that the geographic boundaries of the docking privileges within Lake George were not identified. Many of the decisions cited by Cress or the DNR resolve ambiguity for situations when an easement of a stated width (for examples, six feet or 15 feet) are not accompanied by a separate grant identifying dock privileges within another more general but potentially larger area. Here that area is defined by the grantor as "the northwest part of Lot #23".

26. Regardless of intent, the grantor was limited by two principles of law. These principles also govern what a grantee may receive. Regardless of grantor intent, these principles restrict what the Byers may place within Lake George.

27. The first restriction is that the Byers hold the dominant estate and Cress holds the servient estate for the riparian zone derived from Lot 23. An easement may encumber a riparian zone but does not form a separate riparian zone. *Kranz v. Myers Subdivision Owners*, 973 N.E.2d 615, 618 (Ind. App. 2012). The Schultzes have riparian rights derived from Lot 24. The Byers and Cress share one riparian zone and share riparian rights within a portion of the zone. The Schultzes have a separate riparian zone. Finding 12 and Finding 13. The grantor had no authority to give and the Byers could not receive riparian rights derived from Lot 24.

28. The second restriction is that a trust exists on a public freshwater lake for which the State of Indiana is the trustee. The DNR is the agency primarily responsible for administering the trust. The Lakes Preservation Act places full power of public freshwater lakes in the State to hold in trust for all Indiana citizens to preserve natural scenic beauty and for recreational purposes, including boater and swimmer safety. Finding 8. Usage by a riparian owner or an easement received from a riparian owner cannot violate the public trust.

29. Within these two restrictions, ambiguity in an easement may be derived from extrinsic and parole evidence. *Klotz* cited previously and Finding 16.

30. Here the Parties at hearing provided a thorough and extensive history of the usage of the waters of Lake George, generally, as well as of the particular site in question. With the exception of use of "double boats" which may have been unique to Lake George in the 1940s, the history is typical of use of public freshwater lakes in Northern Indiana during the 20th Century and early 21st Century. Usage has become more crowded over the last 70 years with larger and greater numbers of moored boats. The specifics of structural placement and mooring boats have been dynamic. As boat and land ownership changed, so did pier configurations.

31. Boat owners at the site have sometimes expanded their own use with little consideration for their neighbors, the riparian rights of others, or the interests of the general public. But "[f]irst in time first in right is not a viable factual or legal principle for determining the rights of riparian owners or those of the public on the waters of public freshwater lakes." *Island Prop. Owners Ass'n v. Clemens and DNR*, 12 Caddnar 56, 68 (2009). Placing piers and mooring boats is not a superior purpose to leaving waters unimpeded. That a riparian owner elects to leave a riparian zone open is not an invitation to another person to moor a boat. Mooring a boat in the riparian zone of another does not typically vest a right the boat owner. "Recreational use (especially of water which leaves no telltale path or road)...seems...likely to be permissive" and not actionable

to establish a property right in the user. *Carnahan v. Moriah Property Owners Ass'n*, 716 N.E2d 487 (Ind. 1999).

32. A factual constant is difficult to identify in this proceeding. But the Byers and their predecessors in interest have commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement. Even in the 1940s when testimony supports a finding that two-foot wide piers were not uncommon, the modest "double boat" was more than four feet wide. A double boat and a pier would have encumbered more than six feet of shoreline. Today piers are typically three feet wide, and some types of boats are commonly eight feet wide. The Byers and their predecessors have placed piers on both sides of a three-foot wide pier. The parol evidence is that use by the Byers and their predecessors in interest has commonly exceeded six feet in width.

33. If the grantor had intended the lake space for docking to be the same as the easement, the grantor could have specified a width of six feet or at least written nothing more than that docking was available. The use of additional language indicates the grantor had something more in mind. The presumption is that parties intend for every part of an easement to have some meaning, and a construction is favored that reconciles and harmonizes the entire document. *Parkinson v. McCue*, 831 N.E.2d 118, 128 (Ind. App. 2005). The grantor intent in using the phrase "off the northwest part of Lot #23" is ambiguous, but parol evidence supports a finding the use of a space wider than six feet was anticipated. "Any doubt or uncertainty as to construction of the language of the easement will ordinarily be construed in favor of the grantee." *Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. App. 2012) citing *McCauley v. Harris*, 928 N.E.2d 309, 314-315 (Ind. App. 2010).

34. John Byrer testified at hearing that he could exercise the boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet. ~~A maximum width of fourteen feet is consistent with the terms of the easement granting the ability to dock boats off the northwest part of Lot 23.~~

35. **To grant the Byers the right to use 13 or 14 feet of the shoreline of Lot 23 unnecessarily burdens the servient to an extent greater than was contemplated by the May 19, 1942 conveyance by Bender.**

36. **The common usage of the time being the construction of piers two feet in width and the mooring of doubleboats having a maximum width of five feet more closely aligns with the Byers right to use a maximum width of seven feet off the northwest part of Lot 23's shoreline for docking boats.**

[VOLUME 13, PAGE 282]

37. The Byers must not encroach on the riparian zone of the Schultzes. No other Party objected to their placement of a pier along the common riparian line between the Byers and the Schultzes. The Byers should be authorized to place a pier extending a reasonable distance into Lake George that is no less than one foot south of the common riparian line. No structure should

be placed and no boat should be moored within one foot south or within five feet north of the common riparian line.

38. Subsequent to entry by the administrative law judge of the Findings of Fact and Conclusions of Law with Nonfinal Order, Cress moved for a more definite statement regarding the ability of the Byrers to maintain a boatlift, and the Byrers responded to the motion. For consideration is an easement conferring docking privileges. As applicable to this proceeding, a "drydock...is a...vessel that can be floated to allow a load to be floated in, then drained to allow that load to come to rest on a dry platform." A "boat lift" is a form of floating drydock that is commonly used in private marinas to keep boats out of the water while not in use.^[3] Piers and boatlifts are structures used to exercise docking privileges. See, generally, *Scharlach v. Doswell*, 11 Caddnar 420 (2008). The use of a boatlift is as much the exercise of a docking privilege as is the use of a pier.

39. The Byrers should be authorized to moor two boats ~~on the south side (or one on the south side and one on the lakeward side)~~ of a single straight pier that is not more than three feet wide and that also ~~in a manner that~~ conforms to the requirements of the previous Findings. The Byrers should not place or authorize a pier or another structure and should not moor or authorize ~~allow~~ the mooring of a boat more than ~~15~~ **eight** feet south of the common riparian line between Lot 23 and Lot 24.

40. Cress should not place or authorize a pier or another structure or moor or authorize the mooring of a boat within ~~25~~ **18** feet south of the common riparian line between Lot 23 and Lot 24. The limitation is an appropriate consequence of the phrase "at the northwest part of Lot #23".

Disposition of Affirmative Defenses

41. The Byrers asserted several affirmative defenses or counterclaims. In their "Answer, Affirmative Defenses & Counterclaim", they raise several equitable principles that they assert bar the claims by Cress. These included waiver, estoppel, laches, and acquiescence. In her "Answer and Affirmative Defenses", Cress mirrors the same equitable claims to bar relief sought by the Byrers, and she adds unclean hands.

42. A person seeking the benefit of an affirmative defense has the burden of proof. Many affirmative defenses invoke equitable principles. Trial Rule 8 applied through 312 IAC § 3-1-4. *Belcher & Belcher v. Yager-Rosales*, 11 Caddnar 79 (2007). Equitable principles are diverse and typically require the satisfaction of multiple elements. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638 (Ind. App. 2010). Other identified affirmative defenses (such as the Byrers claims they are merely seeking to defend deeded rights or the Cress claim the Byrers are limited to the use of six feet of frontage) are restatements of claims otherwise addressed here. Except as considered previously in this order, the evidence does not support a disposition upon the affirmative defenses raised by either the Byrers or Cress.

43. No relief is granted to either Cress or to the Byrers based on claims made which are particular to their affirmative defenses.

II. FINAL ORDER

The following orders are effective October 1, 2014. The following orders apply to Lucy V. Cress, Robert A. Schultz, Barbara J. Schultz, John Byrer, Sheri Byrer, and their heirs and assigns, and upon recordation with the Recorder of Steuben County, would apply to subsequent owners of Lot 23, Lot 24, and Lot 38 of Wilder's Addition to Spring Bank. The orders also apply to the Department of Natural Resources with respect to implementation of IC § 14-26-2, 312 IAC § 11, and to statutes or rules that may be subsequently derived from them:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 unless consistent with the following: The Byers shall not encroach on the riparian zone of the Schultzes as identified in Finding 13. The Byers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byers must not place a structure north of this structure. ~~The Byers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide.~~ The Byers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than ~~15~~ **eight** feet south of the common riparian line between Lot 23 and Lot 24.
- (B) Robert A. Schultz and Barbara Schultz must not place a structure or moor a boat within five feet north of the common riparian line between Lot 23 and Lot 24.
- (C) Lucy V. Cress must not place or authorize a pier or another structure or moor or authorize the mooring of a boat within ~~25~~ **18** feet south of the common riparian line between Lot 23 and Lot 24.

Dated: _____, 2015

Jane Ann Stautz
Chair, AOPA Committee
Natural Resources Commission

A copy of the foregoing was sent to the following persons. A person that files a pleading or document with the Commission must also serve a copy on these persons or their attorneys.

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cc: Lori Schnaith, Department of Natural Resources, Division of Water

STATE OF INDIANA)
) SS:
COUNTY OF STEUBEN)

IN THE STEUBEN CIRCUIT COURT

CAUSE NO. 76C01-1410-MI-335

LUCY V. CRESS,)
 Petitioner,)
)
 vs.)
)
INDIANA DEPARTMENT of NATURAL)
RESOURCES, JOHN BYRER, SHERI)
BYRER, BARBARA J. SCHULTZ, and))
ROBERT A. SCHULTZ)
 Respondents.)

ORDER FOLLOWING JUDICIAL REVIEW

Petitioner Lucy V. Cress ("Cress") appears in person, and by co-counsel, Jonathan O. Cress and Stephen R. Snyder. Respondents John Byrer and Sheri Byrer ("Byrer") fail to appear in person, but do appear by counsel, John M. Kuchmay. Respondent Indiana Department of Natural Resources ("DNR") fails to appear by counsel. Respondents Barbara J. Schultz and Robert A. Schultz appear in person and without counsel. Oral argument was conducted in this case on the Petition for Judicial Review of Agency Decision filed by Cress on October 1, 2014. At the conclusion of oral argument, the Court took all matters under advisement. The Court at this time having carefully considered the agency record, the briefs of counsel, and the oral arguments of counsel, now finds and orders as follows:

14-7556
TJG DGI

A. FINDINGS OF FACT -

1. Cress owns Lot 23 in the Plat of Wilder's Addition to Spring Bank in Jamestown Township, Steuben County, Indiana.
2. Lot 23 has approximately 66 feet of lake frontage on Lake George.
3. Schultz owns Lot 24 which lies directly to the north of and is adjacent to Cress's Lot 23.
4. The Schultz's Lot 24 has lake frontage on Lake George.
5. Byrer owns Lot 38.
6. Lot 38 lies across Lane 130A east of Cress's Lot 23 and Schultz's Lot 24 and is without lake frontage on Lake George.
7. Until May 19, 1942, Alline B. Bender ("Bender") owned both Lot 23 and Lot 38.
8. On May 19, 1942, Bender conveyed a part of Lot 23 to H. Poast by Warranty Deed by use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to H. Poast of Williams County in the State of

Ohio for the sum of ----One thousand three hundred
fifty and no/100----Dollars, the following Real
Estate, in Steuben County, in the State of Indiana,
to-wit:

The east 65 feet, east and west, off the entire east
end of Lot numbered 23 of the recorded plat of
Wilder's Addition to Spring Bank, a resort in
Jamestown Township, said county and state, according
to the recorded plat thereof, excepting an easement or
passway six feet in width off the north side of the
above described premises for the use of owners or
tenants of cottage on the west portion of said Lot #23
and the owners or tenants of cottage on Lot #38 of
said Plat. Also conveying an easement or passway 6
feet in width off the north side of the west part of
said Lot #23 extending from the land above described
to the water front of Lake George; also docking
privileges for two boats at the northwest part of said
Lot #23.

Also reserving parking space for two autos or vehicles
in the northeast corner of the land above described
for the use of owners or tenants of the cottage

located on the west portion of said Lot #23....."

(Emphasis added)

9. On May 19, 1942, Bender conveyed a part of Lot 23 to Phil S. Morse and Mildred Morse by Warranty Deed by the use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to Phil S. Morse and Mildred Morse, husband and wife, as tenants by entireties, of Steuben County in the State of Indiana for the sum of ----Eighteen hundred and thirty-five and no/100----Dollars; the following Real Estate, in Steuben County, in the State of Indiana, to-wit:

Lot numbered 23 in the recorded plat of Wilder's Addition to Spring Bank, a resort in Jamestown Township, said county and state, excepting 65 feet east and west off the entire east end of said Lot. Also conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or roadway along the east side of said Lot #23. Also

conveying an auto parking space for two automobiles or vehicles in the northeast corner of said Lot #23 for the use of owners or tenants of the cottage located on the west portion of said Lot #23.

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said Lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants of the east part of said Lot #23 and for two boats for the owners or tenants of Lot #38 of said Plat....." (Emphasis added)

10. On May 19, 1942, Bender conveyed Lot 38 to Arthur Sanders and Bertha Sanders by Warranty Deed by use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to Arthur Sanders and Bertha Sanders, husband

and wife, as tenants by the entireties, of Steuben County in the State of Indiana for the sum of ---- Seven hundred and no/100 (\$700.00)----Dollars, the following Real Estate, in Steuben County, in the State of Indiana, to-wit:

Lot numbered thirty-eight (38) in the recorded plat of Wilder's Addition to Spring Bank, a resort in Jamestown Township, said county and state, according to the recorded plat thereof.

Also, an easement or passway six feet in width extending from the street or road on the west side of said Lot #38 to the water front of Lake George, said easement or passway being off the north side of Lot #23 in said Wilder's Addition to Spring Bank.

Also conveying a dock privilege for two boats off the northwest part of Lot #23 in said Addition for the owner or tenant of the cottage located on said Lot #38...." (Emphasis added)

11. Without reserving an easement or passway along the entire north side of Lot 23, the owners of the west part of Lot 23 would have no access to the roadway, and the owners of the east part of Lot 23, along with

the owners of Lot 38, would have no access to Lake George.

12. Through subsequent conveyances the entirety of Lot 23 is now owned by Cress and is burdened by a six (6) foot easement or passway along its entire northern border extending from the roadway on the east, to the water's edge of Lake George on the west, for the use and benefit of the current owner of Lot 38 - Byrer.
13. A dispute arose between Cress and Byrer regarding where in Cress's riparian zone Byrer should be permitted to exercise his docking privileges, and the width of those docking privileges.
14. On October 30, 2012, Cress filed her Complaint with the Natural Resources Commission ("NRC") seeking to have these issues resolved.
15. On September 4, 2014, the NRC handed down its Final Order which provided, in relevant part, as follows:
 "The following orders are effective October 1, 2014. The orders apply to Lucy V. Cress, Robert A. Schultz, Barbara J. Schultz, John Byrer, Sheri Byrer, and their heirs and assigns, and upon recordation with the Recorder of Steuben County, would apply to

subsequent owners of Lot 23, Lot 24, and Lot 38 of Wilder's Addition to Spring Bank. The orders also apply to the Department of Natural Resources with respect to implementation of IC § 14-26-2, 312 IAC § 11, and to statutes or rules that may be subsequently derived from them:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 unless consistent with the following: The Byrers shall not encroach on the riparian zone of the Schultz's as identified in Finding 13. The Byrers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byrers must not place a structure north of this structure. The Byrers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byrers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24.
- (B) Robert A. Schultz and Barbara Schultz must not place a structure or moor a boat within five feet north of the common riparian line between Lot 23 and Lot 24.
- (C) Lucy V. Cress must not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24."

16. Additional facts will be set forth hereinafter as deemed necessary by the Court.
17. Prior to specifically addressing the issues presented to this Court for review it is worth remembering the standard of review which must be applied when reviewing an agency order. A reviewing court is not bound by an agency's legal conclusions, and a reviewing court should determine whether the agency correctly interpreted and applied the law. A reviewing court, however, cannot reweigh conflicting evidence, and must view the agency record in a light most favorable to the decision arrived at by the agency. A reviewing court does not determine questions regarding witness credibility. This responsibility rests upon the shoulders of the appointed hearing officer.

B. Issue One -

18. Was it the intention of Bender, as manifested by her real estate transfers of May 19, 1942, to limit the docking privileges granted to the owner of Lot 38 to a width of but six (6) feet? The hearing officer determined that such was not the intention of Bender.

Rather, it was the intention of Bender to maintain the six (6) foot passageway off the north side of Lot 23, and to create a separate easement for docking privileges for the benefit of Lot 38 off the northwest part of Lot 23. See, NRC Findings #24 and #25.

19. In the case of Parkison v. McCue, 831 N.E.2d 118

(Ind.App. 2005) the court observed at page 128:

".....An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts..

Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous..

A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning....." (Citations omitted; Quotation marks omitted)

20. If Bender had intended to limit the docking privileges granted to Sanders to a width of no more than six (6) feet at the end of the passageway off the north side of Lot 23 as argued by Cress, she could easily have said so in her Warranty Deed to Sanders, or for that matter, said nothing at all. Rather, in a separate paragraph of the Warranty Deed, Bender granted to Sanders docking privileges the location and width of

which being identified only as "off the northwest part of Lot 23."

21. Viewing the entirety of the Bender to Sanders Warranty Deed set forth above at paragraph 10, it cannot be said that the words selected by Bender in granting an easement for docking privileges for the benefit of the owner of Lot 38 are clear and unambiguous as they pertain to the location and width of those docking privileges.

22. The Court concludes that the decision of the NRC on this issue is not contrary to law.

C. Issue Two -

23. Did the hearing officer commit error by permitting the introduction of parol evidence to contradict the unambiguous intention of Bender when she granted to Sanders docking privileges?

24. This argument as put forth by Cress assumes that the exact location and width of the docking privileges granted to the owner of Lot 38 by Bender were, in fact, clear and unambiguous.

25. This Court has heretofore concluded that the hearing officer did not err in finding that the grant of

docking privileges from Bender to Sanders regarding the location and width of same were ambiguous.

26. The Court, therefore, concludes that the hearing officer did not err in permitting the introduction of parol evidence. See, McCue, supra.

D. Issue 3 -

27. Did the hearing officer err in expanding the riparian area in which Byrer could exercise his docking privileges beyond that necessary for this purpose?

28. Cress contends that by expanding the riparian area from six (6) feet to fifteen (15) feet for the benefit of the dominant estate holder (Lot 38), the hearing officer unnecessarily burdened the servient estate holder (Lot 23) to an extent greater than was necessary to provide docking privileges for the benefit of Lot 38 as were contemplated by Bender on May 19, 1942.

29. In the case of Brock v B&M Moster Farms, Inc., 481 N.E.2d 1106 (Ind.App. 1985), the court held at page 1108:

"In construing an instrument creating an easement, the trial court must ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language in the instrument

from an examination of all the material parts thereof. Where the provision is ambiguous, the court may consider the situation of the property and the parties, and the surrounding circumstances at the time the instrument was executed to determine intent..." (Emphasis added; Citations omitted)

30. Further, the Brock court at page 1109 cited with approval the case of Brown v Heidersbach, 360 N.E.2d 614 (Ind.App. 1977) for the rule that:

"...The servient estate [may only be] burdened to the extent necessary to accomplish the end for which the dominant estate was created. The titleholder of the dominant estate cannot subject the servient estate to extra burdens, any more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement..."

31. As the Final Order of the NRC makes clear, Byrer is permitted to exercise his docking privileges on Lake George commencing a distance of one (1) foot south of the common riparian line between Lot 23 and Lot 24, and ending fifteen (15) feet south of the common riparian line between Lot 23 and Lot 24.
32. The evidence before the hearing officer was that in the year 1942, the year Bender granted docking privileges to Sanders, piers were typically two (2) feet wide on Lake George and doubleboats commonly in use on Lake George were between four (4) feet and five (5) feet in width. Also, there were some motorized

watercraft in use on Lake George that were five (5) feet in width.

33. These facts would have certainly justified the hearing officer awarding to Byrer seven (7) feet for docking privileges off of the northwest part of Lot 23.

34. The hearing officer, however, awarded to Byrer fourteen (14) feet for docking privileges off of the northwest part of Lot 23.

35. It appears to this Court as a reviewing court that the hearing officer failed to base his decision solely upon the size of piers and boats typically in use on Lake George on or about the date (1942) Bender granted docking privileges to Sanders off the northwest part of Lot 23. Rather, the hearing officer based his decision on the size of piers and boats not only in use on Lake George in 1942, but in use on Lake George up to and including the date of hearing.

36. This is clearly reflected by NRC Finding #34 which stated in part:

"John Byrer testified at hearing that he could exercise the boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet....."

37. The hearing officer awarded to Byrer the fourteen (14) feet of shoreline that he requested.

38. The Court wishes to emphasis that it is not reweighing the evidence which was before the hearing officer.

This Court has found no evidence in the record that on or about the date Bender granted docking privileges to Sanders it was customary on Lake George for the placement of a pier and the mooring of a boat(s) to the pier, to encompass a width of fourteen (14) feet.

39. The Court concludes the decision of the hearing officer providing to Byrer the right within which to exercise docking privileges off the northwest part of Cress's Lot 23 of a width of up to fourteen (14) feet is contrary to law and not supported by substantial evidence.

E. Issue 4 -

40. Did the hearing officer commit error by creating an additional ten (10) foot buffer zone within which neither Cress nor Byrer could place a boat or structure of any kind?

41. The manner by which piers are placed into Indiana public freshwater lakes is regulated by the NRC through the Lakes Preservation Act.
42. The placement of a pier into an Indiana public freshwater lake must not unduly restrict the safe navigation of watercraft upon the lake. See, 312 Ind. Admin. Code 11-3-1(b)(3).
43. Both Cress and Byrer will, in their enjoyment of Lake George, be coming and going from their respective piers.
44. A reasonable buffer zone between adjacent piers located in a single riparian zone is one way in which to assure their safety, and that of the general public, and is within the power of the DNR to mandate.
45. The Court concludes that the decision of the hearing officer requiring a ten (10) foot buffer zone is not contrary to law.

F. Issue 5 -

46. Did the hearing officer commit error by admitting into evidence, over Cress's objection, the affidavit of Nancy L. Vinson?

47. Vinson owned Lot 38 from 1985 until 1992. Her affidavit spoke to her use of a pier and the docking of her boat or boats off of the shoreline of Lot 23. More specifically, she stated therein, that she did exceed a width of six (6) feet by the use of her pier and boats.

48. As previously concluded by the Court, so much of the decision of the hearing officer which permitted Byrer to use fourteen (14) feet of shoreline off of the northwest part of Lot 23, exclusive of the ten (10) foot buffer zone, for boat docking privileges was not supported by substantial evidence.

49. Therefore, the issue presented to the Court by Cress regarding the admissibility of the Vinson affidavit has been rendered moot and will not be further addressed by the Court.

G. Issue 6 -

50. Byrer contends that even if the hearing officer committed error in his decision, Cress has failed to show she was prejudiced in any manner by the error and, therefore, the decision of the hearing officer must be affirmed.

51. Byrer's argument continues that Cress still has a riparian zone within which to exercise her boat docking privileges of forty-one (41) feet.

52. Byrer's contention fails to recognize the great value assigned to lakefront lots in Steuben County, Indiana. Lakefront lots in Steuben County, Indiana are valued, in no small part, by determining the amount of lake frontage feet. Listing brokers want to know the number of lake frontage feet. Prospective buyers want to know the number of lake frontage feet. The loss of a single foot of lakefront property can translate into the loss of thousands of dollars.

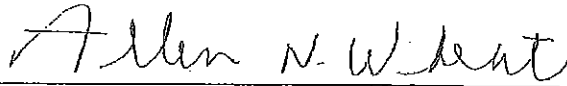
53. The Court concludes that the decision of the hearing officer, which has resulted in the reduction in the size of Cress's usable riparian rights, is inherently prejudicial to Cress.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Pursuant to IC 4-21.5-5-15 the Court now remands this case to the DNR for further proceedings not inconsistent with the order of the Court entered this date.

2. On June 5, 2015, Cress filed with this Court her Motion to Tax Record Preparation Expenses as Costs.
3. Total transcript costs paid by Cress were in the amount of \$1,093.25.
4. Pursuant to IC 34-52-3-1 and Ind. Trial Rule 54(D) total transcript preparation costs of \$1,093.25 shall be taxed one-half (1/2) to Cress and one-half (1/2) to Byrer.

Dated this 17th day of June, 2015.



Allen N. Wheat, Judge
Steuben Circuit Court

Distribution to:

____ RJO
____ Cress
____ Snyder
____ Kuchmay
____ Junk
____ Gore
____ Barbara J. and Robert A. Schultz
____ Wyndham

IN THE MATTER OF:

YES.

**DEPARTMENT OF NATURAL RESOURCES,
Agency Respondent.**

**Administrative Cause
Number: 12-192W**

(Riparian Rights Dispute)

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On October 30, 2012, Lucy V. Cress ("Cress") filed a "Temporary Structure Dispute/Complaint" (the "Cress Complaint") with the Natural Resources Commission (the "Commission") in which she asserted a grievance against John Byrer and Sheri Byrer (the "Byrers").
2. Also on October 30, 2012, Robert A. Schultz and Barbara J. Schultz (the "Schultzes") filed correspondence (the "Schultzes Complaint") in which the Schultzes asserted a grievance against the Byrers.
3. Cress owns real estate at 95 Ln. 130A Lake George, Fremont, Indiana (the "Cress Property"); the Schultzes own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Schultzes Property"); and, the Byrers own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Byrers Property"). The Cress Property includes on its west side approximately 66 feet of frontage along Lake George within Lot 23 in the Plat of Wilder's Addition to Spring Bank in

Jamestown Township of Steuben County ("Lot 23"). The Schultzes Property is to the north in Lot 24 and shares a common boundary with the Cress Property. The Byers Property includes Lot 38, and it is east of the Cress Property and across Lane 130 A Lake George ("Lot 38"). The Byers Property was granted easement rights to Lake George by a previous owner of the Cress Property.

4. Lake George in Steuben County is a "public freshwater lake" as the phrase is defined at Ind. Code § 14-26-2-3 and 312 Ind. Admin. Code § 11-2-17 and is subject to IC § 14-26 (the "Lakes Preservation Act"). *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and "Listing of Public Freshwater Lakes", Information Bulletin #61 (Second Amendment), Indiana REGISTER, 20110601-IR-312110313NRA (June 1, 2011), p. 8. The Commission adopted rules at 312 IAC § 11 to assist with administration of the Lakes Preservation Act.

5. The Cress Complaint and the Schultzes Complaint describe disputes regarding the exercise of riparian rights by the Byers for a portion of Lake George in Steuben County, Indiana.

6. The same administrative law judge was appointed to consider the Cress Complaint and to consider the Schultzes Complaint. During the initial prehearing conferences held concurrently on January 25, 2013 to consider the Cress Complaint and the Schultzes Complaint, Cress, the Schultzes, and the Byers agreed to consolidate the two complaints into this single proceeding. Cress and the Schultzes are collectively the "Claimants". The Byers are the "Respondents".

7. During the initial prehearing conference, Cress moved to add the Department of Natural Resources (the "DNR") as a party. The DNR responded that particularly if mediation were to occur, the inclusion of DNR as a party might be well-considered. The Byers did not object to inclusion of the DNR, and the DNR was added as a party. The DNR is the "Agency Respondent". The Claimants, the Respondents, and the Agency Respondent are collectively the "Parties". Each of the Parties was present during the initial prehearing conference either in person or through an attorney.

8. The Lakes Preservation Act places full power over public freshwater lakes in Indiana. The State holds public freshwater lakes in trust for all Indiana citizens to preserve the lakes' natural scenic beauty and for recreational purposes. The DNR is the agency responsible for

administering the trust. *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).

9. The Commission is the “ultimate authority” for agency determinations under the Lakes Preservation Act, including those derived from competing interests among persons claiming riparian rights or interests in riparian rights that may be sufficient for the placement of piers and similar structures in public freshwater lakes. IC § 14-10-2-4 and IC § 14-26-2-23. *Kranz v. Meyers Subdivision Property Owners*, 969 N.E.2d 1068, 1075 (Ind. App. 2012) and *Lukis v. Ray*, 888 N.E.2d 325 (Ind. App. 2008).

10. The Lakes Preservation Act is derived from legislation originating in 1947. Statutory amendments made in 2000 included the addition of IC § 14-26-2-23. The amendments clarified the Commission is responsible for adopting rules to help implement a licensure program that includes temporary piers. The Commission is also charged with resolving disputes between “the interests of landowners having property rights abutting public freshwater lakes or rights of access to public freshwater lakes.” The Commission is to address “competing riparian interests”. IC § 14-26-2-23(e) and IC § 14-26-2-23(f).

11. The Commission has jurisdiction over the subject matter and over the persons of the Parties.

Delineation of the Riparian Zones of the Cress Property and of the Schultzes Property

12. Where the shoreline approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters. *Bath v. Courts*, 459 N.E.2d 72, 73 (Ind. App. 1984) and the “second principle” in Information Bulletin #56 (Second Amendment), Indiana REGISTER, 20100331-IR-31200175NRA (March 31, 2010), p. 3.

13. The Parties stipulated the second principle delineates properly the common boundary between the riparian zones of the Cress Property and of the Schultzes Property.¹ “Entries Regarding Identification of Riparian Zones of Cress and the Schultzes and Availability of Sandra

¹ Entries prior to the hearing of the facts referred erroneously to the Cress Property as Lot 25. The error was corrected during the hearing. The Cress Property is Lot 23.

Jensen to Serve as Mediator" (April 4, 2013). The shoreline along the Cress Property and the Schultzes Property approximates a straight line, and their common onshore property boundary is approximately perpendicular to the shoreline. Use of the second principle is an appropriate delineation, and the Parties' stipulation is approved. The boundary of the riparian zone between the Cress Property and the Schultzes Property is determined by extending their common onshore boundary in a straight line into Lake George.

Adjudication of Riparian Interests

14. The Claimants are riparian owners. The Byers are not riparian owners but have an easement across the Cress Property. The Byers hold the dominant estate and Cress the servient estate. A determination that persons are not riparian owners "does not settle the question of whether they are entitled to install and use a dock in the property enjoyment of their easement for right-of-way purposes." *Klotz v. Horn*, 558 N.E.2d 1096, 1097 (Ind. 1990), citing *Farnes v. Lane*, 281 Minn. 222, 161 N.W.2d 297, 301 (Minn. 1968). "The issue is not whether the easement holder attains riparian ownership status, but rather, whether he is entitled to use the riparian rights of the servient tenant who has given him access to the body of water bordering the servient estate." Emphasis supplied by the *Klotz* court at 1097.

15. The intentions of the riparian owner who originally granted an easement are to be implemented in construing the easement. In a plat or other recorded conveyance, clear language controls. "Dominant owners of lakeside easements may gain the rights to erect and maintain piers, moor boats and the like by the express language of the creating instrument." *Klotz* at 1097 and 1098. Related documents are construed in *pari materia*. *Charles & Miller v. Dyer*, 13 Caddnar 246, 250 (2014).²

16. Clear and unambiguous language controls. "[G]enerally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been." *Klotz* citing *Badger v. Hill*, 404 A.2d 222, 226, (Me. 1979). In *Klotz*, the Indiana Supreme Court determined the phrase "access to Eagle Lake" for a six-foot wide

² As provided in IC § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission's index of final orders.

easement was ambiguous and properly required the consideration of "extrinsic or parol evidence to ascertain the intent of the parties who created the instrument." A factor determined appropriate to identifying intent was whether, in the absence of a pier, shoreline conditions would make difficult the dominant estate's access to and enjoyment of the lake.

17. The record of title in this proceeding is extensive. Aspects of grantor intent are unambiguous and others are ambiguous.

18. In 1929, Alline Buck Bender ("Bender") received warranty deeds to both Lot 23 and Lot 38.

19. In 1942, Bender conveyed a portion of Lot 23 to Phil S. Morse. She included a conveyance of the following easement or passway:

Also, conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or roadway along the east side of said Lot #23....

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants...of Lot #38 of said Plat.

Respondent Exhibit B and Exhibit C.

20. In 1942, Bender conveyed to H. Poast the east end of Lot 23, together with a conveyance, as follows:

The east 65 feet, east and west, off the entire east end of Lot numbered 23..., excepting an easement or passway six feet in width off the north side of the above described premises for the use of owners or tenants of cottage on the west portion of said Lot #23 and the owners or tenants of cottage on Lot #38 of said Plat. Also conveying an easement or passway 6 feet in width off the north side of the west part of said Lot #23 extending from the land above described to the water front of Lake George; also docking privileges for two boats at the northwest part of said Lot #23.

21. Also in 1942, Bender conveyed Lot 38 to Arthur and Bertha Sanders with the following easement or passway:

Lot numbered thirty-eight (38)...according to the recorded plat thereof.

Also, an easement or passway six feet in width extending from the street or road on the west side of said Lot #39 to the water front of Lake George, said easement or passway being off the north side of Lot #23....

Also conveying a dock privilege for two boats off the northwest part of Lot #23 in said Addition for the owner or tenant of the cottage located on said Lot #38.

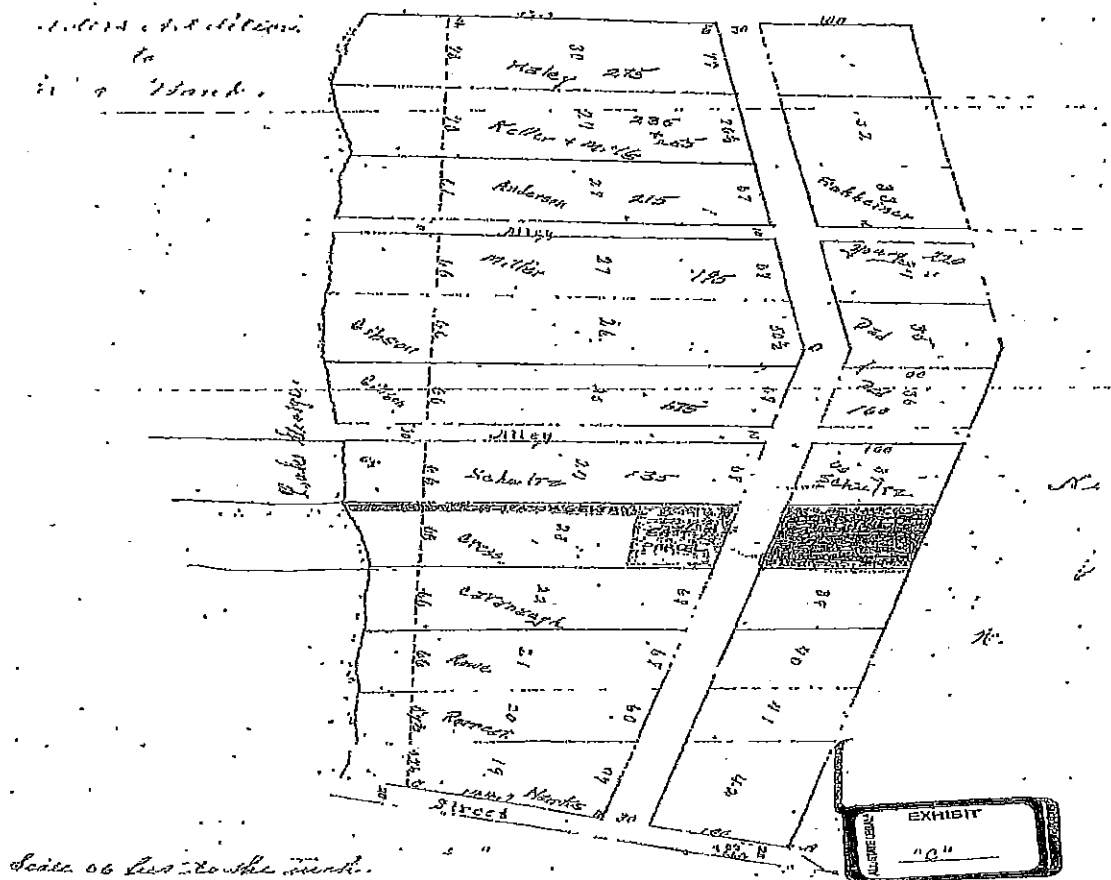
Using the same description, Lot 38 passed through a chain of title and then to Daniel and Nancy Vail in 1985. Respondent Exhibit Q.

22. In 1992, Nancy Vail, an unmarried widow, conveyed Lot 38 to John H. Byrer and Sarah L. Hull as follows:

Lot numbered Thirty-eight (38) in the Plat....

Also an easement 6.0 feet in width off from the North side of Lot numbered Twenty-three (23)...., together with dock privileges [as described in Finding 21].

23. A conceptual rendering of the site in question, without identification of riparian zones or non-riparian interests within Lake George, is colorized and identified as Exhibit "C" in the "Respondents' Post-Trial Brief":



24. The grantor intent was unambiguous in that a six-foot wide easement was established along the northern border of Lot 23, for the benefit of owners of the eastern portion of Lot 23 and the owners of Lot 38, to access Lake George. The grantor intent was also unambiguous in that the owners of the eastern portion of Lot 23 were granted docking privileges for two boats, and the owners of Lot 38 were granted docking privileges for two boats, off the northwest part of Lot 23. In its "Answer, Affirmative Defenses & Counterclaim", the Byrers assert "a deeded right for a pier and two boats...."

25. The grantor intent was ambiguous in that the geographic boundaries of the docking privileges within Lake George were not identified. Many of the decisions cited by Cress or the DNR resolve ambiguity for situations when an easement of a stated width (for examples, six feet or 15 feet) are not accompanied by a separate grant identifying dock privileges within another more general but potentially larger area. Here that area is defined by the grantor as "the northwest part of Lot #23".

26. Regardless of intent, the grantor was limited by two principles of law. These principles also govern what a grantee may receive. Regardless of grantor intent, these principles restrict what the Byrers may place within Lake George.

27. The first restriction is that the Byrers hold the dominant estate and Cress holds the servient estate for the riparian zone derived from Lot 23. An easement may encumber a riparian zone but does not form a separate riparian zone. *Kranz v. Myers Subdivision Owners*, 973 N.E.2d 615, 618 (Ind. App. 2012). The Schultzes have riparian rights derived from Lot 24. The Byers and Cress share one riparian zone and share riparian rights within a portion of the zone. The Schultzes have a separate riparian zone. Finding 12 and Finding 13. The grantor had no authority to give and the Byers could not receive riparian rights derived from Lot 24.

28. The second restriction is that a trust exists on a public freshwater lake for which the State of Indiana is the trustee. The DNR is the agency primarily responsible for administering the trust. The Lakes Preservation Act places full power of public freshwater lakes in the State to hold in trust for all Indiana citizens to preserve natural scenic beauty and for recreational purposes,

including boater and swimmer safety. Finding 8. Usage by a riparian owner or an easement received from a riparian owner cannot violate the public trust.

29. Within these two restrictions, ambiguity in an easement may be derived from extrinsic and parol evidence. *Klotz* cited previously and Finding 16.

30. Here the Parties at hearing provided a thorough and extensive history of the usage of the waters of Lake George, generally, as well as of the particular site in question. With the exception of use of "double boats" which may have been unique to Lake George in the 1940s, the history is typical of use of public freshwater lakes in Northern Indiana during the 20th Century and early 21st Century. Usage has become more crowded over the last 70 years with larger and greater numbers of moored boats. The specifics of structural placement and mooring boats have been dynamic. As boat and land ownership changed, so did pier configurations.

31. Boat owners at the site have sometimes expanded their own use with little consideration for their neighbors, the riparian rights of others, or the interests of the general public. But "[f]irst in time first in right is not a viable factual or legal principle for determining the rights of riparian owners or those of the public on the waters of public freshwater lakes." *Island Prop. Owners Ass'n v. Clemens and DNR*, 12 Caddnar 56, 68 (2009). Placing piers and mooring boats is not a superior purpose to leaving waters unimpeded. That a riparian owner elects to leave a riparian zone open is not an invitation to another person to moor a boat. Mooring a boat in the riparian zone of another does not typically vest a right the boat owner. "Recreational use (especially of water which leaves no telltale path or road)...seems...likely to be permissive" and not actionable to establish a property right in the user. *Carnahan v. Moriah Property Owners Ass'n*, 716 N.E2d 487 (Ind. 1999).

32. A factual constant is difficult to identify in this proceeding. But the Byrers and their predecessors in interest have commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement. Even in the 1940s when testimony supports a finding that two-foot wide piers were not uncommon, the modest "double boat" was more than four feet wide. A double boat and a pier would have encumbered more than six feet of shoreline. Today piers are typically three feet wide,

and some types of boats are commonly eight feet wide. The Byers and their predecessors have placed piers on both sides of a three-foot wide pier. The parol evidence is that use by the Byers and their predecessors in interest has commonly exceeded six feet in width.

33. If the grantor had intended the lake space for docking to be the same as the easement, the grantor could have specified a width or six feet or at least written nothing more than that docking was available. The use of additional language indicates the grantor had something more in mind. The presumption is that parties intend for every part of an easement to have some meaning, and a construction is favored that reconciles and harmonizes the entire document. *Parkinson v. McCue*, 831 N.E.2d 118, 128 (Ind. App. 2005). The grantor intent in using the phrase "off the northwest part of Lot #23" is ambiguous, but parol evidence supports a finding the use of a space wider than six feet was anticipated. "Any doubt or uncertainty as to construction of the language of the easement will ordinarily be construed in favor of the grantee." *Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. App. 2012) citing *McCauley v. Harris*, 928 N.E.2d 309, 314-315 (Ind. App. 2010).

34. John Byrer testified at hearing that he could exercise the boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet. A maximum width of fourteen feet is consistent with the terms of the easement granting the ability to dock boats off the northwest part of Lot 23.

35. The Byers must not encroach on the riparian zone of the Schultzes. No other Party objected to their placement of a pier along the common riparian line between the Byers and the Schultzes. The Byers should be authorized to place a pier extending a reasonable distance into Lake George that is no less than one foot south of the common riparian line. No structure should be placed and no boat should be moored within one foot south or within five feet north of the common riparian line,

36. Subsequent to entry by the administrative law judge of the Findings of Fact and Conclusions of Law with Nonfinal Order, Cress moved for a more definite statement regarding the ability of the Byers to maintain a boatlift, and the Byers responded to the motion. For consideration is an

easement conferring docking privileges. As applicable to this proceeding, a “drydock...is a...vessel that can be floated to allow a load to be floated in, then drained to allow that load to come to rest on a dry platform.” A “boat lift” is a form of floating drydock that is commonly used in private marinas to keep boats out of the water while not in use.³ Piers and boatlifts are structures used to exercise docking privileges. See, generally, *Scharlach v. Doswell*, 11 Caddnar 420 (2008). The use of a boatlift is as much the exercise of a docking privilege as is the use of a pier.

37. The Byers should be authorized to moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide and that also conforms to the requirements of the previous Finding. The Byers should not place or authorize a pier or another structure and should not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24.

38. Cress should not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24. The limitation is an appropriate consequence of the phrase “at the northwest part of Lot #23”.

Disposition of Affirmative Defenses

39. The Byers asserted several affirmative defenses or counterclaims. In their “Answer, Affirmative Defenses & Counterclaim”, they raise several equitable principles that they assert bar the claims by Cress. These included waiver, estoppel, laches, and acquiescence. In her “Answer and Affirmative Defenses”, Cress mirrors the same equitable claims to bar relief sought by the Byers, and she adds unclean hands.

40. A person seeking the benefit of an affirmative defense has the burden of proof. Many affirmative defenses invoke equitable principles. Trial Rule 8 applied through 312 IAC § 3-1-4, *Belcher & Belcher v. Yager-Rosales*, 11 Caddnar 79 (2007). Equitable principles are diverse and typically require the satisfaction of multiple elements. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638 (Ind. App. 2010). Other identified affirmative defenses (such as the


³ Wikipedia, Drydock, <http://en.wikipedia.org/wiki/Drydock> (describing the history and utility of drydocks) (last modified July 22, 2014 at 21:10 GMT).

II. FINAL ORDER

The following orders are effective October 1, 2014. The orders apply to Lucy V. Cress, Robert A. Schultz, Barbara J. Schultz, John Byrer, Sheri Byrer, and their heirs and assigns, and upon recordation with the Recorder of Steuben County, would apply to subsequent owners of Lot 23, Lot 24, and Lot 38 of Wilder's Addition to Spring Bank. The orders also apply to the Department of Natural Resources with respect to implementation of IC § 14-26-2, 312 IAC § 11, and to statutes or rules that may be subsequently derived from them:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 unless consistent with the following: The Byers shall not encroach on the riparian zone of the Schultzes as identified in Finding 13. The Byers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byers must not place a structure north of this structure. The Byers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24.
- (B) Robert A. Schultz and Barbara Schultz must not place a structure or moor a boat within five feet north of the common riparian line between Lot 23 and Lot 24.
- (C) Lucy V. Cress must not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24.

Dated: September 7, 2014


Jane Ann Stautz, Chair
XOPA Committee
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2200

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Byrers claims they are merely seeking to defend deeded rights or the Cress claim the Byrers are limited to the use of six feet of frontage) are restatements of claims otherwise addressed here. Except as considered previously in this order, the evidence does not support a disposition upon the affirmative defenses raised by either the Byrers or Cress.

41. No relief is granted to either Cress or to the Byrers based on claims made which are particular to their affirmative defenses.

A copy of the foregoing was sent to the following persons. A person that files a pleading or document with the Commission must also serve a copy on these persons or their attorneys:

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